No. 15552

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

First Western Savings and Loan Association and Silver State Savings and Loan Association,

Appellants,

vs.

Mae Anderson, Trustee of the Estate of Rose Holding Corporation, and Gordon L. Hawkins,

Appellees.

Appeal From the United States District Court for the District of Nevada.

APPELLEES' ANSWERING BRIEF.

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Summary of Argument.

The District Court was justified in making the allowances to the Trustee and her Attorney first liens on the secured debtor's property. The District Court did not abuse its discretion in setting the amount of the fees and allowances.

ARGUMENT.

I.

The Trial Court Did Not Err in Making the Allowances to Trustee and Her Attorney First Liens on All the Property of the Debtor Even Though No Reorganization Was Effected.

The majority of the cases cited by Appellants were decided under Section 77-B of the Bankruptcy Act or were decided since 1938 (the year Chapter X was enacted) by applying the rule under the old Section 77-B without reference to the 1938 enactment.

Section 246 of the Bankruptcy Act (11 U. S. C. A. 646) reads as follows:

> "Upon the dismissal of a proceeding under this chapter, or the entry of an order adjudging the debtor a bankrupt, the judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such proceeding prior to such dismissal or order of adjudication by any persons entitled thereto, as provided in this chapter, and shall make provisions for the payment thereof, and for the payment of all proper costs and expenses incurred by officers in such proceedings."

There is no comparable provision in the old Section 77-B. (6 Collier's on Bankruptcy 4575; see also *In re Old Algiers, Inc.*, 100 F. 2d 374.)

The distinction caused by the amendment of the Bankruptcy Act was recognized by the Court in *In re Centralia*

Refining Co., 35 Fed. Supp. 599 at 602, where the Court said:

> "In the case before the court the referee has made findings as to the expenses that were incurred for the preservation, protection and benefit of the liened property and charged the liened property with them."

The referee did not make such findings as to the allowances. The Court held this was not error. However, in the instant case the Trial Court specifically held [Tr. Vol. I, p. 99] that:

> ". . . it is found that the services rendered by Mae Anderson, Trustee, and Gordon L. Hawkins, Esq., her Attorney, were rendered for the preservation, protection and benefit of all of the Debtor's property, including that which is subject to liens of first trust deeds and mechanics' liens; . . ."

The Third Circuit Court of Appeals held in a recent case that the administrative expenses could be visited upon mortgaged property in the *Matter of Riddlesburg Mining Company, Inc., Debtor,* 224 F. 2d 834 at 837, saying:

> "Section 246 . . . gives the judge authority to allow reasonable compensation for administration expenses incurred during a reorganization attempt. There is no limitation with regard to secured or unsecured assets. Whether, and to what degree, the mortgage creditors should run a risk of loss in order to make possible a reorganization was wholly within the discretion of the district judge, who properly exercised his discretion."

See also:

In re Chapman Coat Co., 196 F. 2d 799;

In re Rice Leghorn Farm, Inc., 113 Fed. Supp. 903.

In the instant case, the main difficulty in presenting a plan for reorganization was the act of Appellant Silver State Savings & Loan Association in selling the main asset of the estate in violation of the Court's Order of May 3, 1956 [Tr. Vol. I, pp. 14-25], after it had been served with a copy of the same [Tr. Vol. I, p. 267], and the Appellant's refusal to restore the property to the bankrupt estate, even though ordered by the Court [Vol. I, pp. 33, 37, 41, 45, 48, 57, 60, 64; Vol. II, pp. 24, 26-44, 47-78, 128-129].

The statement in Appellants' Brief to the effect that no plan of reorganization could be worked out is belied by the transcript. The first extension of the date for presenting a plan or reasons why a plan could not be effected was December 13, 1956 [Tr. Vol. II, p. 78], which was brought about by the Court's continuation of the contempt proceedings against Appellant Silver State Savings and Loan Association and the second was granted after a full hearing on January 7, 1957, when it appeared likely that a plan could be effected [Tr. Vol. II, pp. 82-103]. That the Court was justified is shown by the Appellant's own appraisal which indicated replacement value of $124,-000.00 with the face value of Appellant's Trust Deed at $96,000.00 [Tr. Vol. II, p. 94, lines 20-23].

The allowances to Appellees were made first liens by the District Court under Section 246 of the Bankruptcy Act, and under the authorities he was so justified especially where the complaining creditor caused the most delay by its sale of property in violation of the Order and its refusal to restore the *status quo*.

II.

The District Court Did Not Abuse Its Discretion in Setting the Allowances.

It is well and good for Appellants to cite the criteria of reasonableness of fees and allowances, but have failed to show this Honorable Court where they were not followed by the District Court in this case. The only matter concerning the Court in this appeal is whether the lower Court abused its discretion. (*In re Solar Mfg. Corp.,* 206 F. 2d 780; *Stein v. Hemker,* 157 F. 2d 740; *In re Barceloux,* 74 F. 2d 289.)

Appellants state the Trustee and her Attorney are being paid for duplicate services (Br. pp. 19 and 20). Apparently it believes only one person can prepare and file papers. All matters of preparation of reports were joint efforts requiring the time and ability of both the Trustee and her Attorney.

Appellants complain that there is no research time shown in the Attorney's Petition, but the Court need only be referred to Transcript Colume II, page 91, line 7, to page 92, line 1.

Conclusion.

For the reasons stated Appellees respectfully request that this Honorable Court affirm the Order of the Trial Court.

Respectfully submitted,

GORDON L. HAWKINS,

Attorneys for Appellees.